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Supreme Court of the United States

OCTOBER TERM, 1955

No. 630

CONLEY TRIGG FIELDS, LUTHER COMPTON and KIRBY SMITH, *Petitioners*

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Conley Trigg Fields, Luther Compton and Kirby Smith (hereinafter referred to as Petitioners or Defendants), and each of them, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on December 27, 1955, wherein said Court affirmed the judgment of the United States District Court for the Western District of Virginia at Abingdon.[1]

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1. Herein the United States Court of Appeals for the Fourth Circuit is referred to as the "Court of Appeals", "Fourth Circuit", or "Appellate Court", and the United States District Court for the Western District of Virginia, at Abingdon, as the "trial court", or "District Court".

A transcript of the record in said case, including the proceedings and all matters in the United States Court of Appeals for the Fourth Circuit, is furnished herewith in accordance with the Rules of this Court.

Opinions Below

No opinions were rendered in the District Court. The opinion of the Court of Appeals will be reported, ...F (2d) ....., and is printed as a part of the Appendix to this Petition.

Jurisdiction

The judgment of the Court of Appeals was entered on December 27, 1955. The jurisdiction of this court is invoked under Title 18 U. S. C., Section 3736 and Title 28 U. S. C., Section 1254 (1).

Questions Presented

1. Did the acts of the Defendants constitute a conspiracy to injure, oppress, threaten or intimidate citizens in the exercise of rights guaranteed by the Constitution?

2. Did the Congress intend that 18 U. S. C. 241 should be used to authorize Federal supervision of all phases of the electoral process in elections to fill Federal offices and to make a crime against the United States of all agreements to violate any State law regulating such elections?

3. Was the Court of Appeals justified in holding, in the face of direct proof to the contrary, that the jury was entitled to believe that Fields or Compton, or both, forged the ballots alleged to have been cast by some of the thirty voters in the Honaker precinct?

4. Was it proper to admit evidence relating to the irregularity of voters' registration at times long prior to the offenses charged in the indictment?

5. Was it proper for the Court to charge the jury that if they believed that the Defendants had conspired to violate the Virginia election laws, then this constituted a Federal offense?

6. Was it proper for the Court to refuse to grant prayers for charges on behalf of the Defendants dealing with registration, methods of voting and qualifications of voters?

Statutory Provisions Involved

The pertinent Federal statutory provision involved is Section 241 of Title 18 of the United States Code:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

The pertinent Virginia statutes involved are Sections 24-73, 24-105, 24-240, 24-319, 24-320, 24-327, 24-332, 24-333, 24-339 and 24-341 of the Virginia Code. These provisions are set forth in the printed Appendix hereto.

Statement

1. *The Indictment, Trial Proceedings and the Court of Appeals' Judgment.*

At the May, 1954, term of the District Court an indictment was found against Conley Trigg Fields. Letha Fields, Paul S.

Gilmer, Luther Compton, Kirby Smith and William F. Deel, charging them with conspiracy to cause or attempt to cause legally qualified voters to vote in the election for members of the Congress in November, 1952, in an illegal manner in violation of the laws of Virginia and that the Defendants did cause or attempt to cause unqualified voters to impersonate qualified voters, that the Defendants did cast forged, fraudulent and fictitious votes and that they did obstruct and hinder qualified voters from voting and by these acts caused a false return and count of the votes, all with intent to injure, oppress, threaten and intimidate citizens in the exercise of rights guaranteed by the Constitution.

On motion of the Defendants, a Bill of Particulars was filed setting out the names of twenty-six voters in the Lebanon precinct and forty-three names in the Honaker precinct, as persons whom the Government charged were qualified voters but whom the Defendants caused or attempted to cause to vote by absentee ballot in an illegal manner. The Government also furnished twenty-four names in each precinct of persons whom the Government charged were unqualified or disqualified voters, whom the Defendants caused or attempted to cause to impersonate qualified voters and vote by mail. The Government did not contend that there were any actual impersonations of one person by another, but did charge that the Defendants represented that five persons in the Lebanon precinct and seven persons in the Honaker precinct, who were not eligible to vote, were qualified voters. The Bill of Particulars also charged that the Defendants cast forged, fraudulent or fictitious votes for these same persons. The Bill of Particulars also set out that there were no qualified voters whom the Defendants actually obstructed, hindered or prevented from voting or for whom forged or fraudulent votes had been cast or deposited.

The Defendants pleaded not guilty to the indictment and a trial began on the 30th day of May, 1955, at Abingdon and was concluded in the late afternoon of June 3rd. (Prior to the trial the Government dismissed the indictment as to

Letha Fields and Paul S. Gilmer). No evidence was introduced as to the Lebanon precinct.

The verdict of the jury found that William F. Deel was not guilty, but that Conley Trigg Fields, Luther Compton and Kirby Smith were guilty, and the Court fixed their punishment at six months' confinement for Fields, twelve months' confinement and a fine of One Thousand Dollars ($1,000.00) for Compton, and Smith was placed on probation. Upon appeal, the Court of Appeals by judgment entered December 27, 1955, affirmed the trial court's judgment.

2. *The Facts.*

The Defendants are all residents of Russell County, Virginia, and were Democratic party workers interested in the Presidential and Congressional election held on November 4, 1952. Fields lived at Lebanon, the County seat, some twenty miles distant from Honaker, the scene of the acts charged in the indictment, and was in the Honaker precinct on only one day prior to the November election. During the period preceding the election he was employed as a guard at the Radford Arsenal, about one hundred miles from Lebanon. Luther Compton lived about two miles beyond Honaker, but had an office in Honaker where he was engaged in the lumber business. Kirby Smith, a first cousin of Luther Compton, was at the time acting postmaster at Honaker and lived there.

Russell County is in the mountainous area of Southwestern Virginia, and political lines are very tightly drawn. It appears that the Democratic party was anxious to get out a full vote in the 1952 election and to this end through various of its organizations, under the Chairmanship of William Hendricks, was active in obtaining applications for mail ballots from all qualified voters who might not be able to vote at the polls in person. In the primary election for the United States Senator held in the summer of 1952, Luther Compton had been very active in what is known

locally as "working the mail vote". In the November election he was requested by William Hendricks, Chairman of the Congressional Campaign Committee, to assist in the Honaker precinct in obtaining a full mail vote.

The Virginia statute authorizes voting by mail by any duly qualified voter, "who will, in the regular and orderly course of his business, profession, occupation, or other personal affairs, . . . be absent from the city, town or from the precinct in which he is entitled to vote, if in a County, and any such voter who may be physically unable to go in person to the polls on the day of election". *Virginia Code* (Michie), Section 24-319. This provision has been construed liberally in order to prevent undue hardship or inconvenience. In the instant case there was no evidence that any person voted by mail who did not fall in one of the categories mentioned in the statute.

The mechanics of voting by mail are that a person desiring so to vote makes an application to the registrar of the precinct upon a form furnished him and the registrar certifies that the applicant is a registered voter in that precinct. The application is then sent to the County Electoral Board and that Board, if it finds the application to be in proper form, sends by registered mail to the applicant an envelope containing a folded ballot marked, "ballot within; do not open except in the presence of a notary public"; an envelope in which the marked ballot is to be returned on which is a printed certificate to be signed by the voter and the officer before whom his acknowledgement is taken; a properly addressed envelope for the return of the ballot by registered mail to the Electoral Board; and, lastly, a printed instruction slip and a coupon to be signed by the officer, giving a brief description of the voter, as to apparent age, height, color of hair, etc. The applicant, after receiving this registered letter, is required to open, mark and reseal the ballot in the presence of the Notary and to return the ballot by registered mail to the Electoral Board. The Board then, on election day, delivers the ballots, vouchers and

coupons, together with a list of persons voting to the Judges of election in each precinct.

Many applications for ballots were obtained by various persons from voters in the Honaker precinct and mailed to the Electoral Board at Lebanon. A number of these applications requested that the ballots be sent to the applicant in care of Luther Compton. Persons testifying at the trial assigned as the reason for this that they knew that he was a Notary Public and if their ballots were sent in his care, there would be a Notary available before whom they might mark the ballots. This custom of mailing ballots in care of a designated officer had been practiced by both parties in previous elections and bore the approval of the Attorney General of Virginia in a opinion dated June 2, 1944, in which the Attorney General said, "there is no statutory provision prohibiting this, nor do I know of any reason why the request of the voters should not be complied with". A. 368. [1]

On October 22, 1952, a number of registered letters with ballots enclosed, sent by the Electoral Board, came to the Honaker post office addressed to various individual voters in care of Luther Compton. Kirby Smith, the acting postmaster, typed out registered receipts to be signed by Compton and took the letters and receipts, approximately thirty, to Compton's office for delivery to him in accordance with the U. S. Postal regulations. Some time prior to the receipt of these letters Compton had been told that the Federal Bureau of Investigation would investigate the mail ballots cast in the November election. Compton told Smith to take the letters back to the post office until he, Compton, could consult an attorney about the propriety of receiving them. Smith did this and Compton later went to Lebanon and consulted two attorneys, both of whom advised him that it was legal to accept delivery of the registered letters sent in his care. Compton then notified his secretary, Betty Jo Musick, to go to the post office and accept delivery of the letters. Someone in the post office changed the date on the receipts from October 22nd to October 29th. However, the evidence indi-

1. References to Appellants' Appendix in the Court of Appeals will be designated "A".

cated that the letters were actually delivered prior to this later date. After the envelopes containing the ballots were brought to Compton's office, some of the voters came there in person to mark their ballots. The remainder of the ballots Compton put in his automobile and took with him so that if he saw any of the applicants, their ballots could be voted.

Many of the applicants lived in remote localities and on bad roads, and it was quite a task to go to see all of them in person. Compton, who is an active businessman, informed Hendricks, the campaign manager, that he could not give the time necessary to make all of these trips and requested that someone replace him. Chairman Hendricks, by chance, saw the Defendant, Conley Trigg Fields, on the street in Lebanon and knowing that he was a former Democratic office holder (Deputy Sheriff) and active worker, asked him if he could help to notarize some of the ballots in the Honaker precinct. Fields said that he had only one day off from his job but that he would be willing to devote this day to working in the Honaker precinct. Early in the morning of the next day Fields went to Compton's home, and Compton gave Fields the envelopes containing all of the unvoted ballots. There was bad feeling between Fields and Compton, because Compton had not supported Sheriff Samples, under whom Fields had served, for re-election, and Samples had been defeated. The conversation between Fields and Compton was extremely brief, consisting only of the request that the ballots be delivered pursuant to a telephone message from Chairman Hendricks.

After receiving the ballots from Compton, Fields went to the home of Sheriff Samples expecting that Samples would accompany him, as Fields was not well acquainted in that neighborhood. As soon as Samples saw that the ballots had been sent in care of Luther Compton, his attitude changed and he was unwilling to have anything further to do with the matter. He attempted to tell Fields where the various people lived, but Fields said that he would need someone to show him the different houses and asked who might be

available to go with him. Samples suggested Ralph Griffith (referred to in the record as "Hess" Griffith) and said that Fields could probably find Griffith around the drugstore in Honaker. Fields went to Honaker and was successful in getting Griffith to go with him on his rounds. (Samples died before the trial, but his widow corroborated Fields as to his visit and request).

Fields accompanied by Griffith visited a number of the voters, took their acknowledgements, furnished them with sample ballots authorized by law (*Va. Code*, Section 24-240), and in some instances gave the voters assistance in marking their ballots. The certificate was then signed and the ballots resealed and given to Fields to mail. The type of assistance rendered by Fields was in one instance to hold the top of a pencil while the voter marked the ballot (A. 42), to show another voter where on the ballot to place his mark (A. 103, 104) and in other instances to give information as to the political affiliation of the candidates, saying that if the voter wished to vote the Democratic ticket, he should mark the first square on the ballot (A. 241, 242). After Fields had finished his rounds, he either placed the voted ballots in the mail or gave them to Luther Compton. There were one or two voters that he did not find and these ballots were returned to Compton. This ended Fields' connection with any voting in the Honaker precinct.

It also appeared that Compton, at the request of the voters, gave some of them information or direction to insure that they voted for the Democratic candidates. However, every witness who testified said that they had confidence in Fields and Compton and that the ballots were marked in accordance with the voter's individual preference.

The postal records of the Honaker and Lebanon post offices were introduced showing the delivery of the registered mail to Luther Compton, as permitted by the Postal Regulations, and the receipt at Lebanon of the returned ballots. The dates on the receipts at the Honaker office were changed

from October 22nd to October 29th. No attempt was made to conceal this change. The evidence was that someone in the post office, other than Kirby Smith, made this change and that the date, October 29th, did not necessarily reflect the actual date on which Compton received the ballots, which according to the evidence was some time prior to the 29th.

No witnesses testified that Kirby Smith had anything to do with soliciting applications for absentee ballots nor with the actual voting of those ballots. The only evidence with respect to Kirby Smith was that he, as Postmaster, held the ballots in the post office without making further effort to deliver them until Compton could decide whether or not to accept their delivery. The evidence further shows that no ballots were delivered to Compton unless they had been sent in his care by the Electoral Board.

Two members and the Secretary of the Electoral Board, a bipartisan body, testified that no ballots were mailed in care of Compton unless the applicants had so requested. They further testified that the Board examined all of the envelopes containing absentee ballots cast in the Honaker precinct and that these were, as far as they could tell, in proper form and that they could find no discrepancies between the signatures on the applications and those on the coupons acompanying the returned ballots.

It was shown that all of the persons whose applications or ballots were in any way connected with any of your Petitioners were qualified voters in Russell County and had been voting at the Honaker precinct. It is true that some of them were not actually enrolled on the registration books of the Honaker precinct, but the failure of those books to contain their names was satisfactorily accounted for, and in each instance it was shown beyond question that the individual voter had done all that was necessary from his or her standpoint to entitle him or her to vote in Russell County. An instance of this is the case of Lynn Moore, who had originally registered at Dante and had taken his

transfer to the proper official at Honaker and had been voting there for some years. It developed that while his name had been taken off of the books at Dante and that those books showed his transfer to the Honaker precinct, in some way his name had not actually been enrolled on the registration book at that precinct.

No question was made of any forged, fraudulent or fictitious voting except as to two ballots, one, that of Mrs. Reedy, formerly Jewell Lambert or Harris, whose ballot was mailed by the Electoral Board to her in care of Luther Compton and Compton testified that he did not recall what had become of that ballot, though he knew that he had not opened, marked, or certified it. This ballot was mailed to the Electoral Board from the Raven Post Office, which is thirty miles distant from the Honaker Post Office, and there was no evidence of any sort to connect Conley Fields or Kirby Smith with this ballot. The other possibly forged, fraudulent or fictitious ballot was that of Grover Sullivan, but the Government's own bill of particulars does not list him as one for whom such a ballot was cast. On the contrary it is alleged that he was a qualified voter and voted in an illegal manner and furthermore this witness was not only impeached as to his veracity, but two disinterested witnesses testified that he, in fact, voted in their presence and that one of them, who was a notary public, took the acknowledgement to his ballot. Sullivan's statement itself is equivocal as he merely says that if he did vote he did not remember it.

Specification Of Errors To Be Urged

The Court of Appeals erred:

1. In holding that the acts of the Defendants constituted a conspiracy to injure, oppress, threaten, or intimidate citizens in the exercise of rights guaranteed by the Constitution.

2. In holding that violations of the Virginia absent

voters' law pursuant to a plan constituted a crime within the meaning of 18 U. S. C. 241 and that "one of the issues in this case was whether the Defendants violated the Virginia election laws in rendering assistance to the voters in the marking of their ballots".

3. In holding, in the face of direct proof to the contrary, that the jury was entitled to believe that Fields or Compton, or both, forged the ballots alleged to have been cast by some of the thirty voters in the Honaker precinct.

4. In holding that it was proper to admit evidence relating to the irregularity of voters' registration at times long prior to the offenses charged in the indictment.

5. In holding that "the District Court's charge to the jury to the effect that a conspiracy to cast illegal votes in the election contrary to the election laws of Virginia was a crime under 18 U. S. C. A., Section 241" was proper.

6. In holding that it was proper for the District Court to refuse to grant Defendants' prayers for charges in accordance with the Virginia statutes in regard to registration, methods of voting and qualifications of voters.

Reasons For Granting The Writ

1. In holding that the acts of the Defendants constituted a conspiracy to injure, oppress, threaten, or intimidate citizens in the exercise of rights guaranteed by the Constitution, the Court of Appeals has decided a Federal question in a way, probably in conflict with applicable decisions of this Court and directly in conflict with the Court of Appeals for the Second Circuit. Furthermore, it has extended the construction of 18 U. S. C., Section 241 far beyond the limits previously adopted by this Court and it is important that this Court determine this question.

Your Petitioners in their Briefs filed in the Court of Appeals posed as one of the questions for review that the

evidence did not establish the commission of a *Federal* offense. They did not contend that the indictment did not state an offense. Nevertheless, the Court of Appeals rephrased the issue in its opinion as "Does the indictment state an offense under 18 U. S. C. A., Section 241 and, if so, was the evidence sufficient to support the verdict of guilty?". Defendants have always realized, and here admit, that the indictment was sufficient, but earnestly contend that the acts which the Government proved did not amount to a violation of 18 U. S. C. 241 as previously construed by this Court.

The Fourth Circuit upheld the Defendants' conviction on the ground that "the right of citizens to vote in the election of members of Congress, *in accordance with applicable State laws,* is a right secured by the Federal Constitution". (emphasis supplied) The Court then held that the acts of the Defendants, Fields and Compton, in giving assistance to voters in marking their ballots in violation of Virginia law and the act of Kirby Smith in holding at the post office the mail ballots addressed in care of Compton, were sufficient to support the conviction of these Defendants on the ground that they had conspired to injure, oppress, threaten, or intimidate citizens in the exercise of their Constitutional rights.

It is well settled that the right to cast a ballot and the right to have that ballot counted are rights protected by 18 U. S. C. 241 but the question raised in the instant case of what acts are necessary to injure a citizen in the exercise of such rights has never been exactly defined, although the Courts have established certain limits.

For twenty years after the amendment of the Enforcement Act in 1894, there were no prosecutions under the section, which is now 18 U. S. C. A., 241. Then a case was presented where a majority of a County election board agreed to disregard precinct returns, thus making a false return in the election of a member of the Congress. A demurrer to the indictment was sustained, and the Supreme Court

reversed, holding that "the right to have one's vote counted is as open to protection by Congress as the right to put it in the box." *United States v. Mosley*, 238 U. S. 383. (Mr. Justice Lamar in a vigorous dissent thought that the statute could not be stretched so far). This decision was followed two years later by *Aczel v. United States*, (C.C.A. 7th) 232 Fed. 652, where, pursuant to a conspiracy, the officials of a city and county by means of fraud, intimidation and actual arrests refused to allow voters to vote and election officers to act in a Congressional election. The Court held that an allegation of these facts was sufficient to sustain a charge of conspiring to injure citizens in their right to vote in that election. Neither the *Mosley* case nor *Aczel v. United States*, passed on the sufficiency of the evidence, and there is no intimation in either opinion that all violations of state election laws could constitute a deprivation of constitutional rights within the meaning of 18 U. S. C. 241. As a matter of fact, within four years after the decision in *United States v. Mosley*, this Court in unanimous opinions staked out two limitations on prosecutions under Section 241. The first case, *United States v. Gradwell*, 243 U. S. 476, held that the statute was not applicable to purely state elections nor to primaries which could not be considered an integral part of a national election.

The second case upheld the action of the lower court in sustaining a demurrer to an indictment charging a conspiracy to injure citizens in their rights, *inter alia*, that only qualified voters should vote; that election results should be determined by voters who had not been bribed; and that the election board should make a true and accurate count of votes legally cast by qualified electors and no others. *United States v. Bathgate*, 246, U. S. 220. The Court said that Section 19 of the Criminal Code, now 18 U. S. C. 241, still had the same meaning as when first enacted as a part of the Enforcement Act of 1870, and that "considering the policy of Congress not to interfere with elections within a state except by clear and specific provisions, together with

the rule respecting construction of criminal statutes, we cannot think it was intended to apply to conspiracies to bribe voters." The opinion continued that as bribery had been denounced in a part of the Act since repealed, it could not be included within the remaining section and, if included, also would be "almost any act reprehensible in itself, or forbidden by state statutes, and supposed injuriously to affect freedom, honesty or integrity of an election." The Court again defined the right protected by Congress "as a definite, personal one, capable of enforcement by a Court, and not the political, non-judiciable one common to all that the public shall be protected against harmful acts".

In the years following the *Gradwell* and *Bathgate* cases, the Courts seem to have followed a rule of degree, so that when the frauds were wholesale and amounted to actual deprivation of the voters' rights the act was held to apply. *United States v. Pleva,* (C.C.A. 2nd) 66 F. (2d) 529 (falsifying returns by election officials); *Walker v. United States,* (C.C.A. 8th) 93 F. (2d) 383 (counting votes actually cast for one candidate as cast for his opponent); *Devoe v. United States,* (C.C.A. 8th) 103 F. (2d) 584 (voting nonexistent voters, refusal to count votes actually cast, and falsifying election returns); *United States v. Clark,* (D. C. W. D. Missouri) 19 F. Supp. 981 (destroying and altering ballots actually cast). During this period the Act was held not to apply to tampering with ballots for candidates for state office which resulted in minor changes for Congressional and Senatorial candidates, *Steele v. United States* (C.C.A. 3d) 85 F. (2d) 867; nor to the inclusion of disqualified voters, *United States v. Kantor,* (C.C.A. 2nd) 78 F. (2d) 710. In the latter case the Court held that the trial court had erroneously charged the jury that if a vote were unlawfully cast it injured the rights of other citizens within the meaning of 18 U. S. C. 241. The Court said:

> "It is not every wrongful act, which alters the result of the election, which is punishable under the statute.

It must be some act intended to prevent some citizen from exercising his constitutional rights." 78 F. (2d) at page 712.

The Court went on to point out that the offense of disqualified voting was defined originally in the Enforcement Act, that this section had been repealed, and hence under the rule of *United States v. Bathgate, supra,* "illegal and disqualified voting was held no longer to be a federal offense".

The Court of Appeals in the instant case dismissed *United States v. Kantor, supra,* with the words, "In the light of the *Classic* case, supra, there is small comfort for the Defendants" in the *Kantor* case. This Court in *United States v. Classic,* 313 U. S. 299, extended the operation of 18 U. S. C. 241 to election frauds in primaries which were an integral part of a Congressional election. In its opinion the Court upheld the sufficiency of an indictment which charged that election officials in Louisiana altered 83 ballots cast for one candidate and 14 cast for another, marking and counting them as votes for a third candidate. These allegations brought the *Classic* case squarely within the rule of *United States v. Mosley, supra.* This is not authority for holding that voting in an illegal or unauthorized manner is an offense under 18 U. S. C. 241 and it is respectfully submitted that the Court of Appeals' holding to the contrary is not authorized by the *Classic* case and is in direct conflict with the decision of the Court of Appeals for the Second Circuit in the *Kantor* case.

The most recent decision of this Court construing 18 U. S. C. 241 is *United States v. Saylor,* 322 U. S. 385, in which the Court held that an indictment should be sustained which charged a conspiracy to injure voters in their right "to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots fraudulently cast and counted, recorded, returned and certified". The indictment further charged that the defendants, who were election

officials, forged signatures to official ballots, placed these ballots in the ballot box, and certified and returned them. The majority of the court said these acts came within the rule of *United States v. Mosley, supra,* rather than within the rule of the *Bathgate* case. and "For election officers knowingly to prepare false ballots, place them in the box and return them, is certainly to prevent an honest count by the return board of the votes lawfully cast". The majority opinion did not attempt to overrule either the opinion or the reasoning in the *Bathgate* case. There was a strong dissent by Mr. Justices Douglas, Black and Reed on the ground that the majority opinion might open the way for Federal supervision of all election frauds and that this was a matter for Congress and not the Court.

Since the decision in the *Saylor* case the Courts of Appeals have apparently continued to make the same distinctions as formerly, and there has been no broadening of the meaning of Section 241 to include offenses which had not been so considered prior to *United States v. Saylor.*

Klein v. United States (C. A. 8th, 1949) 176 F. (2d) 184, *Cert. denied,* 338 U. S. 870, sustained a conviction on evidence that many voters were physically obstructed from voting, that a large number of qualified voters who did not go to the polls were voted by persons impersonating them, that some people voted twice, and that there was a fraudulent count of the ballots actually cast. Thus, this case is strictly within the rule of *United States v. Mosley, supra.* Another case, *Prichard v. United States* (C.A. 6th 1950) 181 F. (2d) 326, affirmed for lack of a quorum, 339 U. S. 974, involved the placing of 254 forged ballots in a ballot box, and the Court held that this action deprived the other voters of their right to an honest count, the right laid down in the *Mosley* case. The only other case is that of *Crolich v. United States,* (C.A. 5th, 1952) 196 F. (2d) 879, where the sole question was the sufficiency of the indictment. There is no indication in the Court's opinion of the nature of the acts alleged to have been committed, but the indictment charged that "false,

forged and fictitious votes" were cast, and that disqualified persons impersonated citizens "to vote in their place".

Thus, in no case which counsel have been able to find construing Section 241 has there been a conviction in which was not present one or more of the following factors: intimidation by force, actual impersonation of voters, forgery, alteration of ballots already cast, or a dishonest count of ballots actually cast. It is respectfully submitted that none of these factors are present in the case at bar. There was no evidence that any person who was qualified to vote was prevented from voting, and there was no evidence that the ballots cast were not honestly counted. The only evidence which the Government introduced which might be considered even remotely as coming within any of the foregoing categories was the evidence of Grover Sullivan, in response to a question as to whether he voted in the 1952 election, "No, sir, if I did I don't remember it" (A. 38), and of Mrs. Dewey H. Reedy that she was known as Jewel Harris (although that was never her name), and that she did not vote in the 1952 election (A. 97). With regard to the qualified statement of Grover Sullivan (who was impeached and as no attempt was made to rehabilitate him, it may be assumed that it could not have been done), there was positive evidence by two disinterested parties that Sullivan did vote (A. 325, 348). That leaves only one ballot out of the total of 111 mail ballots as to which there was evidence tending to the conclusion that the ballot was not genuine, and there was no evidence connecting any of the Defendants with the marking, mailing or voting of that ballot.

It is extremely significant that all the Government witnesses testified that they were duly registered voters, entitled to vote and that none of them even intimated that their ballots had been marked contrary to their intentions; but, on the contrary, witness after witness said their votes were cast for the candidate of their choice (A. 43, 47, 50, 56, 65, 71, 93, 94, 109, 118, 121, 127, 129, 132).

Finally there was no evidence that any of the ballots were altered or that fictitious ballots were placed in the ballot box. The evidence is that duly qualified voters voted for the candidates of their choice, with the possible exception of Sullivan and Mrs. Reedy, two votes out of a total of over six thousand in the County. There is a great contrast between this situation and the "ghosts" and "sleepers" of Kansas City, *Devoe v. United States, supra,* or the placing of large numbers of forged ballots in the box, *Prichard v. United States, supra.*

The Court of Appeals in reviewing the evidence said that there was evidence that Compton was active in working the mail vote, that there was an agreement between him and Chairman Hendricks about this vote, that Compton paid Griffith to secure applications to vote from persons on a list supplied by Compton and that Compton caused ballots to be sent in his care. It is respectfully submitted that not a single act mentioned above nor all of them together constituted a violation of State law. The Court went on to say that Fields and Compton assisted voters in marking their ballots. This was a violation of State law but it is respectfully submitted that rendering assistance to voters to vote for candidates of their choice did not amount to a fraud upon or an injury to the Constitutional rights of citizens to have their ballots placed in the box and properly counted. On the contrary, it is submitted that the facts of the instant case bring it squarely within the rule of *United States v. Bathgate, supra,* which says that 18 U. S. C. 241 should not be extended to every act "supposed injuriously to affect freedom, honesty or integrity of an election". The Court of Appeals in sustaining the convictions in the instant case completely disregarded the distinction between the doctrines of the *Mosley* and *Bathgate* cases, a distinction reaffirmed by this Court in the *Saylor* case. The dissenting Justices in the *Saylor* case pointed out that such a broadening of the law might result but "the Court of course does not go quite that far." 322 U. S. 385, 392.

2. The trial Judge after verdict made the comment that the evidence "convinces me beyond any doubt at all that the absentee voting law was grossly violated with knowledge and pursuant to a plan". The Court of Appeals held that such a violation of the Virginia statute was a crime within the meaning of 18 U. S. C. 241. The Appellate Court also considered as a leading issue in the case "whether the Defendants violated the Virginia election laws in rendering assistance to the voters in the marking of their ballots". It is admitted that Fields and Compton did render assistance to the voters contrary to Virginia law, but it is submitted that this is a matter for the Virginia courts and not for Federal supervision and punishment. In holding to the contrary the Court of Appeals has disregarded clear statements of this court and has erroneously construed an act of Congress, 18 U. S. C. 241, and its action in so doing should be reviewed by this court.

The present Code section under which the Defendants were convicted was originally a part of the Enforcement Act of May 31, 1870, 16 Stat. 144, which covered a number of offenses including, "do any unlawful act to secure a right or opportunity to vote for himself or any person". This Act was amended by an Act of February 8, 1894, 28 Stat. 36, which repealed many of its provisions. The committee report sponsoring the amendment stated:

> "Let every trace of reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion or force used, they will be the first to feel it." H. Rep. No. 18, 53rd Cong., 1st Sess., page 7.

In *United States v. Gradwell, supra,* this court reviewed the legislative history of the Enforcement Act and what is now 18 U. S. C. 241 and unanimously held that it was:

"clearly established that the policy of Congress for so great a part of our constitutional life has been, and now is, to leave the conduct of the election of its members to state laws, administered by state officers, and that whenever it has assumed to regulate such elections it has done so by positive and clear statutes, such as were enacted in 1870." 243 U. S., at page 485.

The Enforcement Act made criminal a number of different acts such as (section 5), preventing, hindering, controlling or intimidating, or attempting so to do, any person from exercising, or in the exercise of the right of suffrage, by means of bribery, threats, or threats of depriving such persons of employment or occupation, or of ejecting a person from property; (section 19) vote more than once in the same election, "or vote without having a lawful right to vote", or "Do any unlawful act to secure a right or an opportunity to vote for himself or any other person", or by any such means or otherwise induce any voter to refuse to vote; (section 20), knowingly personating and registering, or attempting to register in the name of another person, or "fraudulently register, or fraudulently attempt to register, not having a lawful right so to do", or do any unlawful act to secure registration, or by bribery, reward or other unlawful means hinder or prevent any person from registering, or to attempt to compel or induce an officer by any such means or other unlawful means to admit any person to registration, or to interfere with the registration, or for an officer to knowingly and wilfully register as a voter any person not entitled to be registered or to refuse registration, or "if any officer or other person . . . shall knowingly neglect or refuse to perform any duty required by law, or violate any duty imposed by law, or do any act unauthorized by law relating to or affecting such registration or election, or the result thereof."

By the provisions noted, Congress attempted to make a Federal offense of every act in connection with an election made unlawful by a State statute, and in addition made a

Federal offense of any unlawful act done in connection with the registration of the voter, or in any manner violating any duty imposed by law in connection with voting, and specifically mentioned bribery individually, without conspiracy, and influencing, without conspiracy, any person to vote, or not vote, by means of threatening such person about lack of employment or ejection from a house.

As has been pointed out, the Act was amended by deleting therefrom the blanket provisions for criminal conduct in regard to registrations and the conduct of elections. There were also eliminated the specific provisions as to bribery and improper influencing by threats of loss of job, or promise of job, etc., the provisions for damages in civil actions, the authority to appoint special marshals to supervise elections, and the only Federal offense remaining, other than going in disguise on the highway which is not involved in the instant case, is the conspiracy to injure, oppress, threaten or intimidate citizens in the enjoyment of rights given by the Constitution.

This Court in the *Bathgate* case, *supra,* held that the repeal of that portion of the Enforcement Act relating to bribery indicated that Congress did not intend that conspiracies to bribe voters should be punished as a Federal offense "considering the policy of Congress not to interfere with elections within a State except by clear and specific provisions." The Court of Appeals for the Second Circuit in *United States v. Kantor, supra,* held that the offense of illegal voting could not be punished under the Federal statute. The ruling of the Court of Appeals in the instant case is directly in conflict with these cases.

Although it is admitted that Fields and Compton gave assistance to voters in marking their ballots and thus violated Virginia law, their conduct cannot be construed as anything more than "do any unlawful act to secure a right or an opportunity to vote for himself or any other person". Section 19 of the Enforcement Act of 1870. This section was specifically

repealed by the Congress and, therefore, this doing of an unlawful act without more could not constitute a violation of the Federal statute in its present form. To hold otherwise would be to hold that every violation of a Virginia election law, if done pursuant to a plan, may be punished by the Federal Government. The position taken by both the trial court and the Court of Appeals seems to be that the Enforcement Act of 1870 was never amended and that the United States may punish any infraction of the innumerable election laws of the forty-eight states in a Congressional election. Mr. Justice Douglas in his dissenting opinion in *United States v. Saylor, supra,* concurred in by Mr. Justices Black and Reed, said "Congress has ample power to legislate in this field and to protect the election of its members from fraud and corruption . . . I would leave to Congress any extension of Federal control over elections", and added that legislation in such a vast field should be left to the Congress and not to the courts. It is respectfully submitted that the holding of the Court of Appeals in the instant case has so extended the operation of 18 U. S. C. 241 as to nullify completely the clearly expressed intent of Congress when it struck out the numerous offenses contained in the Enforcement Act.

The Government took the position, which was apparently sustained by both the trial court and the Court of Appeals, that the Defendants were being prosecuted for a conspiracy to place illegal ballots in the ballot box. The Court of Appeals in sustaining the conviction relied heavily on *United States v. Saylor, supra,* but the majority opinion in that case did not overrule the *Bathgate* case but said, "for election officers knowingly to prepare false ballots, place them in the box, and return them", violated the rights of citizens to cast their ballots and have them counted. The *Saylor* case did not go so far as to hold that an irregularity in the electoral process would violate the Constitutional rights of citizens. If the ruling of the Court of Appeals is sustained in the instant case, it will undoubtedly mean Federal super-

vision of all phases of elections for members of Congress in the several states and careful scrutiny to see whether any of the numerous state laws regulating such elections have been violated, and all this in the absence of a clear statement by the Congress that it intended such results.

3. The Court of Appeals' holding, in the face of direct proof to the contrary, that the jury was entitled to believe that Fields or Compton, or both, forged the ballots alleged to have been cast by some of the thirty voters in the Honaker precinct was in direct conflict with applicable decisions of this court. In its opinion the Court of Appeals said that 29 mail ballots were delivered to Compton on October 29th and that almost all of these ballots were mailed at Honaker to the Electoral Board in Lebanon on that same day and added "from the evidence as to the distance involved, inaccessability of some of the homes, time required in balloting, and the employment of some of the voters, the jury was entitled to believe that it was an impossibility for Fields to have gotten in touch with more than thirty people on one week day and to have gotten the ballots back through the mail to Lebanon on the same day, *that some of those voters were never seen and that their ballots were illegally cast by Fields or Compton, or both.*" (emphasis supplied). The evidence did not clearly establish that the ballots were actually delivered on October 29th. The assistant postmistress testified that a mistake could well have been made in the records showing the delivery date of October 29th. (A. 392, 394). The evidence established that agents of the Federal Bureau of Investigation interviewed all of the persons who voted by mail in the Honaker precinct. Of these persons twenty testified at the trial on behalf of the Government. Eleven of the Government witnesses testified affirmatively that Fields came to their homes with their ballots and that they marked these ballots in his presence. (A. 34, 40, 56, 60, 67, 89, 99, 101, 113, 117, 130). Seven witnesses testified that they marked their ballots in the presence of Luther Compton and one of these witnesses, Eura Sykes, said that her parents

voted before Compton as well. (A. 46, 49, 53, 93, 108, 121, 125). The Government did not introduce a single witness who denied Fields' account of his going to the homes of various voters nor one witness, whom Fields testified that he visited, who denied that Fields had seen him personally. The evidence is overwhelming that Fields and Compton did visit these voters and that all of the voters were seen by one or the other. There is no evidence to support an inference to the contrary and the action of the Court of Appeals in so holding and, in effect presuming a conspiracy except as founded on the evidence, is in the words of Mr. Justice Jackson "fundamentally and irreconcilably at war with our presumption of innocence". *Krulewitch v. United States,* concurring opinion, 336 U. S. 440, 457.

In order for the jury to have inferred that Fields or Compton did not see the voters, it must have disbelieved the direct testimony of eighteen Government witnesses. After making this inference in direct conflict with the evidence, the jury then must have inferred that Fields or Compton forged the ballots by signing the voters' names on the envelopes. Again this inference is in conflict with the direct testimony of the Chairman and the Secretary of the Electoral Board and the minority party representative on that Board that the signatures of the voters on the applications and on the return envelopes were the same. (A. 197, 350).

From these two inferences the jury was then, according to the Court of Appeals, entitled to make a third inference that an unlawful conspiracy existed. The well established rule is that an inference must have evidence to support it, *Wesson v. United States,* 172 F. (2d) 931, and that one inference cannot be drawn from another. "Charges of conspiracy are not to be made out by piling inference upon inference." *Direct Sales Company v. United States,* 319 U. S. 703, 711. It is respectfully submitted that this holding of the Court of Appeals is in conflict with this Court's clear statement and that if the Defendant's conviction was based, as the Court of Appeals stated, on this series of inferences it should not be allowed to stand.

4. The Court of Appeals held that it was proper for the District Court to admit evidence relating to the irregularity of the registration of some of the voters at times long prior to the offense charged in this indictment. Section 24-105 of the Virginia Code provides that all persons on the registration book will conclusively be presumed to be qualified to vote from the standpoint of literacy and residence unless a petition has been filed within a prescribed period for the purpose of removing their names from the registration list. The statute says that this presumption applies "in all proceedings where the right of such person to registration arises, by election officers and judicial tribunals" and further provides "it shall not be permitted to be shown to the contrary where no petition has been filed within the time prescribed". Evidence was introduced, over the objection of the Defendants, from which the jury might have inferred that certain voters could not read or write, and, therefore, ought not to have been registered, and thus were not entitled to vote. The Government strongly urged that such was the case and that the Defendants acted in concert to secure the votes of these persons. It is submitted that inasmuch as no action had been taken to remove these persons from the registration list, their right to vote was conclusively presumed and any acts of the Defendants in procuring their vote were not violations of State law and, of course, could not be violations of Section 241.

The Virginia Court has outlined the duties of judges of elections with regard to absentee ballots; that is, "to ascertain whether each of the persons whose ballots were so offered had been properly registered, and then whether they had qualified themselves to vote at that election by payment of State poll taxes for the three preceding years, and also to consider every other fact which might have then appeared to show that the person was not a qualified voter". *Moore v. Pullem*, 150 Va. 174, 199. There was no evidence introduced in the case at bar that judges of elections did not properly exercise their function or that any of these Defendants in

any way influenced, or even had any contact with, the election judges. The admission of evidence, therefore, as to irregularity in registration, was forbidden by the Virginia statute, was irrelevant to the charges against the Defendants and could only have been prejudicial to these Defendants. The Court of Appeals in its opinion apparently relied partially on this evidence to sustain the Defendants' conviction.

This evidence was inadmissible under the doctrine of *United States v. Kantor, supra,* which ruled that the offense of disqualified voting could not be punished under the Federal act. In upholding the trial court's allowing the issue of the proper registration of these voters and their qualifications as to literacy to go to the jury, the Court of Appeals ruled in conflict with the holding in the *Kantor* case and with the construction placed on Section 241 by this court in *United States v. Bathgate, supra.*

5. The Court of Appeals held "the District Court's charge to the jury to the effect that a conspiracy to cast illegal votes in the election contrary to the election laws of Virginia was a crime under 18 U. S. C. A. Section 241, was under the circumstances of this case, entirely proper. This seems to have been settled by the *Classic, Yarbrough, Saylor* and *Mosley* cases and the other cases previously cited". It is submitted that this ruling of the Court of Appeals is in conflict with the cases cited by it and is based upon an erroneous conception of the offense charged. In particular, *Ex Parte Yarbrough,* 110 U. S. 651, cited by the court does sustain the proposition that the casting of one illegal ballot pursuant to a conspiracy is a Federal offense. However, at the time of the *Yarbrough* decision, the Enforcement Act was in effect which specifically made the doing of an illegal act to secure a vote a crime against the United States. Congress repealed that portion of the Act and thus nullified that portion of the decision in the *Yarbrough* case. It is respectfully submitted that not one of the other cases cited by the Court of Appeals sustains the position that a conspiracy to cast illegal votes is a crime under Section 241.

This holding of the Court of Appeals illustrates the extreme length to which Federal supervision of elections may go and the extent to which the Enforcement Act will be re-enacted by the courts if the conviction of these Defendants is sustained.

6. The Court of Appeals held that it was proper for the District Court to refuse to grant prayers for charges in accordance with the Virginia statutes in regard to registration, methods of voting and qualifications of voters apparently on the ground that these statutes were not binding on United States courts. The question was also raised as to whether some of the prayers were in proper form. The Defendants' request No. 15 would have told the jury that if the applicants for registration had done all that was required of them and that through oversight or neglect the registrar had not actually enrolled their names on the registration books, that they were nevertheless qualified voters in the precinct. This request followed Virginia Code Section 24-105 and the interpretation placed on that section by the Virginia court in *Xippas v. Commonwealth*, 141 Va. 497, where the Court said at page 512:

> "Every qualified elector has the right to cast his ballot for the candidate of his choice, untrammeled by the mistakes, misdeeds and irregularities committed by those charged with the preparation of the ballot and the conduct of the election. Such acts on the part of the officers must not be permitted to disfranchise a voter, or deprive a candidate of a vote for the office to which he aspires."

Failure to charge the jury on this point opened the way for a finding that some of the voters were not duly registered and that, therefore, their votes were illegal, which fact the jury might have considered as tending to establish the gilt of one or more Defendants.

In view of the fact that Congress has seen fit to enact no laws for the election of its members, the statutes of the several states and the interpretation placed thereon by the state courts must govern the electoral process. Failure of the court properly to charge the jury in regard to the Virginia laws concerning registration, methods of voting and qualifications of voters, meant that the jury could not intelligently reach a conclusion as to the effect of the acts alleged to have been committed by the Defendants.

Conclusion

The Fourth Circuit's erroneous determination of the questions presented has resulted in that Court's affirming the conviction of your Petitioners in the District Court. Hence, for the reasons herein assigned and discussed, Petitioners, and each of them pray that this Petition for Writ of Certiorari may be granted, and that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit entered as aforesaid on December 27, 1955.

Respectfully submitted,

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